

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of)	
)	IB Docket No. 95-22
Market Entry and Regulation of)	RM-8355
Foreign-affiliated Entities)	RM-8392

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To: The Commission

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PETITION FOR RECONSIDERATION

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Cable & Wireless, Inc. ("CWI"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby submits its Petition for Reconsideration of the Commission's Market Entry Order. That Order attempts to promote competition by establishing rules governing the entry of foreign carriers into the U.S. market for international telecommunications services.¹ For three reasons, CWI respectfully submits that the decision to apply the new "effective competitive opportunities" ("ECO") test to previously authorized affiliates of foreign carriers seeking to add circuits to an existing international route does not constitute reasoned decision-making, and therefore must be reversed on reconsideration. First, far from promoting competition, the rule will actually undermine competition and directly harm U.S.

¹ Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order, FCC 95-475, IB Docket No 95-22 (rel. Nov. 30, 1995) ("Market Entry Order").

consumers.² Second, the Commission did not explain how granting requests for additional capacity on existing routes would harm competition, or if such harm would occur, why it would not be outweighed by the public interest detriments of application of the rule.³ Third, the Commission did not recognize that applying the ECO test to requests for additional capacity subverts the equitable justification for grandfathering existing authorizations; the Commission expressly had found those authorizations to be in the public interest, but never informed CWI or other foreign-affiliated carriers, which invested in the U.S. in reliance on those authorizations, that their ability to compete would later be sharply restricted.

I. INTRODUCTION AND SUMMARY

Foreign-controlled and foreign-affiliated carriers such as CWI have served the U.S. on both a facilities basis and a resale basis for well over fifty years. Entry by these carriers has been subject to *ad hoc* review of Section 214 applications, and approved by the Commission based on explicit findings that the additional competition in the U.S. international services market produced by such entry would advance the public interest. CWI and other foreign-affiliated carriers have become important

² See *Office of Communications of the United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C.Cir. 1985) ("Rational decisionmaking ... dictates that the agency simply cannot employ means that actually undercut its own purported goals.").

³ See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977) (in adopting rules the FCC must demonstrate a "rational connection between the facts found and the choice made") (quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962)).

players in the U.S., stimulating competition and providing valuable expertise to U.S. customers with global needs.

The instant proceeding reviews the Commission's foreign ownership policies and determines that new rules on market *entry* should be adopted, with the "primary purpose" of fostering effective competition in the U.S. telecommunications market.⁴ As subsidiary goals, the Order states that the new regulations also are designed to prevent anticompetitive conduct and encourage foreign governments to open their communications markets.⁵ Given the Commission's findings and the long-settled business expectations of CWI and other foreign-affiliated carriers, however, the Market Entry Order should have focussed on establishing new rules to govern only *future* market entry. The Order exceeds its appropriate scope by extending those rules to requests for expansion of capacity by authorized carriers on existing routes.

While CWI supports the Commission's general goals, it does not believe the FCC has properly weighed all factors in reaching its public interest determination. As a result, the rules set forth in the Market Entry Order will not only fail to serve their intended purpose, but actually undermine the Commission's overall objectives. In particular, CWI believes that compelling *existing* carriers seeking to add capacity on *previously authorized* routes to meet the new ECO standard will thwart the development and maintenance of effective competition in the U.S. telecommunications

⁴ Id. at ¶ 8.

⁵ Id. at ¶ 6.

market, adversely affecting U.S. consumers. In addition, such a rule largely negates the Commission's recognition that equitable considerations compel grandfathering existing authorizations. Moreover, applying the ECO requirement to requests for additional capacity on existing routes is unnecessary as a safeguard against anticompetitive behavior, and is a costly and ineffective means of encouraging other countries to remove barriers to competitive entry. Accordingly, the public interest requires that the ECO test not be applied in such circumstances.

II. APPLYING THE ECO STANDARD TO REQUESTS FOR ADDED CAPACITY ON EXISTING ROUTES STIFLES COMPETITION AND INJURES U.S. CONSUMERS.

The Market Entry Order substantially changes the prior *ad hoc* analysis applied to requests by foreign carriers or their affiliates to provide international service in the U.S. Under the standard adopted in the Order, the Commission will examine whether "effective competitive opportunities" exist for U.S. carriers in the "destination markets" of foreign carriers seeking to enter the U.S. international services market through affiliation with a new or existing U.S. carrier. A U.S. carrier will be classified as an affiliate of a foreign carrier for purpose of applying the ECO test if a foreign carrier owns 25 percent of the capital stock, or a controlling interest at any level, in the U.S. carrier.⁶

Notably, the Market Entry Order states that the Commission will not apply the ECO standard to existing Section 214 authorizations held by foreign-affiliated carriers.

⁶ Id. at ¶ 73.

In so doing, the Commission appropriately acknowledges that it already has imposed safeguards to protect against anticompetitive conduct, and that it would be "inequitable to subject these carriers' current authorizations to further entry review."⁷ Thus, the Commission recognizes that grandfathering existing carriers is necessary to maintain the benefits of existing competition and avoid disrupting existing carriers' legitimate business expectations. Nonetheless, the Commission states that it will apply the ECO standard both to applications by existing carriers to initiate service to an affiliated route and -- in a marked and unexplained change from its existing policies -- *to add circuits to an already-authorized affiliated route*.⁸

Applying the ECO standard to requests to add capacity undercuts the Commission's "primary objective" of promoting effective competition in the U.S.

⁷ Id. at ¶ 109.

⁸ The failure to explain why the ECO test should be applied to requests for additional capacity, notwithstanding the public interest determination attached to previously granted authorizations, is contrary to the Commission's obligations under the Administrative Procedure Act. Appellate courts reviewing FCC orders have cautioned repeatedly that the Commission must provide a reasoned analysis when it departs from existing policies. See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir. 1970), cert. denied, 403 U.S. 923 (1971) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies are being deliberately changed, not casually ignored."); *Mountain States Tel. and Tel. Co. v. FCC*, 939 F.2d 1021, 1035 (D.C.Cir. 1991) ("[W]hile an agency is free to alter its past rulings and practices ... [it] must provide a reasoned explanation for any failure to adhere to its own precedents. ... That explanation must establish a 'rational connection between the facts found and the choice made,' ... and must be articulated 'with sufficient clarity or specificity to permit [a court] to engage in meaningful review.'")(internal citations omitted); *California v. FCC*, 905 F.2d 1217, 1234 (9th Cir. 1990)("'[A]n agency's view of what is in the public interest may change. ... But an agency changing its course must supply a reasoned analysis.'")(quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43-44 (1983)).

market for international telecommunications services. Application of the ECO test will hinder carriers' ability to meet the needs of existing customers and attract new business, creating great harm for both the carriers and their U.S. customers. Yet the Commission has not even attempted to show how this new requirement specifically furthers its goals in this proceeding; nor has the Commission made findings in the record that would justify the rule. Further, application of the ECO test in this situation effectively negates the Commission's attempt to preserve the status quo by grandfathering existing authorizations. The requirement also is unnecessary to prevent anticompetitive conduct, and is an overbroad and ineffective means of attempting to promote liberalization abroad.⁹

A. Applying the ECO Test to Requests for Additional Capacity Will Frustrate the Commission's Goal of Promoting Global Competition.

Compelling foreign-affiliated carriers to make an ECO showing every time they seek to add circuits on existing routes will diminish, not promote, competition in the global communications market, to the detriment of U.S. consumers. In these circumstances, application of the ECO standard handicaps the ability of foreign-affiliated competitors to respond to the dynamic international market and to serve the global needs of U.S. consumers on routes they historically have served. Customers with global communications needs demand rapid installation of both initial networks and facilities to accommodate growth. CWI will be hindered in retaining existing

⁹ See United Church of Christ and Home Box Office, *supra* note 2.

subscribers and attracting new ones if it cannot assure them that it will be able to accommodate their requirements expeditiously and effectively.

Moreover, the capacity cap imposed by the new rule will preclude CWI from engaging in effective price competition. The international telecommunications market, like all aspects of the communications industry, is typified by substantial economies of scale. Effectively prohibiting CWI from expanding capacity will prevent it from achieving such economies and render it unable to offer the magnitude of volume discounts that customers have come to expect. Such a result plainly harms consumers and arbitrarily protects some U.S. service providers at the expense of others.

In short, the Commission's decision to apply the ECO standard to requests for additional circuits on existing routes, far from furthering the Commission's competition goal, will undermine CWI's ability to compete, and directly harm U.S. customers with global communications needs. The rule therefore constitutes both bad policy, and, under well-established precedent, unreasoned decision-making.¹⁰

B. Applying the ECO Test to Requests for Additional Capacity Effectively Nullifies the Decision to Grandfather Existing Authorizations.

Subjecting requests for additional capacity to the ECO requirement negates the Commission's desire to grandfather existing authorizations. In conducting its past operations and obtaining the necessary authorizations, CWI reasonably expected that it

¹⁰ See note 2, *supra*.

could expand the capacity of its routes as dictated by demand. In granting 214 authorizations to CWI, the Commission expressly found that competition by CWI would serve the public interest, convenience, and necessity, and that any theoretical competitive issues could be addressed by conditioning the authorizations. The agency gave no indication that, absent anticompetitive behavior by CWI, limits might be placed on its ability to obtain additional capacity in the future. Nor did the NPRM in this proceeding provide notice that requests for additional capacity by existing carriers serving existing routes would not be grandfathered. As a result, CWI through the years has sought authorization for capacity reflecting the demand it reasonably expected -- and the technology that was available -- at the time it filed its applications. Many of these authorizations were granted long before the NPRM in this proceeding was issued.¹¹

The rule will effectively "freeze" CWI's operations in time and place as the international telecommunications market continues to grow dramatically, with demand increasing and customers placing a premium on the ability of competitors to provide rapid, seamless, global networking solutions with the newest technology. CWI has responded to these changes by seeking to position itself as a global competitor. To be an effective competitor, however, CWI must be capable of quickly adding capacity and

¹¹ See, e.g., Authority to Resell the Services of Other Common Carriers to provide Private Line Services Between the U.S. and International Points, ITC-90-190 (rel. March 8, 1993). The NPRM, of course, gave no notice that requests for expansion of capacity on authorized routes might be subject to any new requirements.

making new technologies available to existing and potential customers.¹² The new requirement therefore subverts the Commission's decision to avoid inequity by grandfathering existing authorizations.

C. Applying the ECO Test to Requests for Additional Capacity Is Not Necessary to Prevent Anticompetitive Conduct and Is Not an Effective Means of Promoting Liberalization Abroad.

Given existing Commission safeguards against anticompetitive behavior, there is no need to apply the ECO standard to requests for additional circuits. As acknowledged by the Commission in grandfathering current authorizations, a multitude of Commission requirements assure fair competition by existing foreign-affiliated carriers, including the "no special concessions" obligation, detailed reporting requirements, and dominant carrier regulation of services to certain countries. The Commission articulated no reason to expect that permitting these carriers to expand capacity on already authorized routes, in the absence of an ECO showing, would trigger anticompetitive conduct where none has occurred to date.¹³ Indeed, constraints on adding capacity are themselves plainly anticompetitive, since they insulate non-

¹² The Commission recognized as much in its NPRM on streamlining the international Section 214 process, where it sought comment on proposals that "will enable international carriers to respond to the demands of the market with minimum regulatory interference." Streamlining the International Section 214 Authorization Process and Tariff Requirements, Notice of Proposed Rulemaking, IB Docket No. 95-118, FCC 95-286 (rel. July 17, 1995) at ¶ 1 ("International Section 214 Authorization NPRM").

¹³ See note 8, supra.

affiliated U.S. carriers, such as AT&T, from competition by experienced, worldwide telecommunications operators.

Nor is application of the ECO test to requests for additional capacity warranted as a way of promoting liberalization abroad. Any benefits of the rule in this context will be far outweighed by diminished competition in the U.S. The Commission apparently believes the ECO requirement, in the context of adding circuits to an already authorized route, will compel foreign governments to expedite the liberalization process. Even assuming this is true, the Commission must consider whether the likely market-opening impact will outweigh the deleterious effects on competition documented above. This, the Commission did not do. If it had, CWI respectfully submits that it would not have adopted this rule. U.S. customers with multinational network needs would be deprived of competition by CWI and any similarly situated carriers for their entire networks. As competition for international network services intensifies, CWI's failure to timely respond in providing service to a particular country could quickly result in the loss of a customer's global business. In return, customers might see a marginal increase in competition on individual routes. Consequently, the competitive costs of the rule plainly outweigh the negligible benefits.

Indeed, CWI has serious doubts that the ECO standard, as applied to requests for new capacity on existing authorized routes, would have any impact on decisions by foreign governments to expedite liberalization of telecommunications markets. The Commission's assumption to the contrary would be valid only if the U.S. entity or its foreign affiliate had both the ability and sufficient incentive to influence the decision-

making process in the country at issue. Such a situation is highly unlikely to occur. First, the relation between the U.S. entity and the affiliate in most destination markets is likely to be attenuated. Second, the affiliate in the destination market, even if properly motivated, is unlikely to be able to persuade the government to change market entry policies that may be designed to accomplish desired social objectives in the relevant country, simply to allow an indirect affiliate of the local service provider to compete in the global telecom market.

For these reasons, the requirement to make an ECO showing in order to add circuits to already authorized routes is arbitrary, inequitable, and contrary to the Commission's own goals. As the Commission acknowledged in the International Section 214 Authorization NPRM, "because regulation can interfere with market forces, it may . . . have an adverse impact on economic efficiency and consumer welfare."¹⁴ The NPRM in this proceeding likewise recognized that restricting the participation of foreign-controlled or foreign-affiliated carriers tends to shelter domestic providers from the forces of competition, and thereby inhibits competition in the provision of global communications services.¹⁵ Accordingly, the requirement should be eliminated on reconsideration.

¹⁴ International Section 214 Authorization NPRM at ¶ 1.

¹⁵ See Market Entry and Regulation of Foreign-Affiliated Entities, Notice of Proposed Rulemaking, 10 FCC Rcd 4844, 4853-54 (1995).

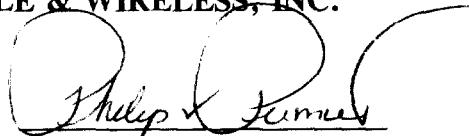
III. CONCLUSION

For the foregoing reasons, CWI respectfully requests that the Commission abolish the new rule requiring previously authorized foreign-affiliated carriers seeking to add capacity to an already-authorized route to make an ECO showing.

Respectfully submitted,

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